

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FEDERAL ELECTION COMMISSION, :

4 Petitioner, :

5 v. : No. 00-191

6 COLORADO REPUBLICAN FEDERAL :

7 CAMPAIGN COMMITTEE. :

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9 Washington, D.C.

10 Wednesday, February 28, 2001

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United
13 States at 11:16 a.m.

14 APPEARANCES:

15 BARBARA D. UNDERWOOD, ESQ., Acting Solicitor General,
16 Department of Justice, Washington, D.C.; on
17 behalf of the Petitioner.

18 JAN W. BARAN, ESQ., Washington, D.C.; on behalf
19 of the Respondent.

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CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 00-191, Federal Election Commission v. Colorado Republican Federal Campaign Committee.

General Underwood, I'm sorry, I called you General Greenwood before.

MS. UNDERWOOD: Thank you.

QUESTION: I now recognize you by your true name.

ORAL ARGUMENT OF BARBARA D. UNDERWOOD
ON BEHALF OF THE PETITIONER

MS. UNDERWOOD: Mr. Chief Justice, and may it please the Court:

Twenty-five years ago in Buckley this Court held that limits on campaign contributions can be more easily justified under the First Amendment than limits on campaign expenditures, and noted that a coordinated expenditure, such as one made at the candidate's request, is treated as a contribution for this purpose.

Nothing in the First Amendment requires an exemption from these rules for political parties. Congress recognized that parties are different from other political actors and gave them somewhat higher contribution limits and much higher limits on coordinated expenditures.

1 QUESTION: I think that you do have a problem in
2 sustaining this part of the congressional act because the
3 basis for sustaining the limits on contributions is the
4 corruption rationale that has been in our cases for, you
5 know, 50, 60 years. But it's very difficult, at least for
6 me to see how receiving a contribution would corrupt a
7 political party.

8 MS. UNDERWOOD: Political parties present the
9 risk -- a risk of the corruption that justifies limits on
10 contributions and coordinated expenditures in two ways.
11 First, because they can receive contributions in much
12 larger amounts than other actors and then redistribute
13 them to candidates, they provide a conduit for other
14 actors to circumvent the contribution limits of the act.
15 Other donors can make large contributions to the party
16 which, though not technically, literally earmarked, and
17 therefore not in violation of the specific earmarking
18 provision of the statute, nevertheless through informal
19 and well understood arrangements find their way through
20 the party to the candidate and create the same risk or
21 appearance of corruption as a direct contribution to the
22 candidate.

23 QUESTION: Well, if those informal arrangements
24 are that actually this money is given to the party but we
25 know you're going to give it to candidate X, certainly the

1 Congress can prohibit that. Perhaps it already has.

2 MS. UNDERWOOD: Congress has prohibited
3 earmarking, but the Court recognized in Buckley itself
4 that a prohibition on earmarking cannot reach, cannot be
5 effective to reach the whole problem of, in effect, using
6 an intermediary to exceed the limits, and the reason is
7 for one thing an earmarking arrangement requires something
8 more rigid than what would usually happen. I mean, it's
9 not earmarking, for example, if -- within the meaning of
10 the statute, if a contributor understands that there is a
11 good likelihood that the money will be passed by the party
12 to the candidate, although there might be reasons why it
13 would not. In that case it's not earmarking, but it still
14 has the prospect of being regarded by the candidate and by
15 the donor as virtually a contribution.

16 QUESTION: Let me get this straight. I can
17 understand why there's, you know, corruption if the donor
18 gives the candidate money and there's a quid pro quo, the
19 candidate says I'll vote for your bill. But you allow
20 individuals to spend \$100,000 in their own advertising for
21 this candidate, and it says at the bottom of the ad, you
22 know, paid for by Schwartz, and the candidate knows
23 Schwartz has bought hundreds of thousands of dollars of
24 television advertising, that is perfectly okay, right?

25 MS. UNDERWOOD: That's the distinction between

1 --

2 QUESTION: But if Schwartz gives \$100,000 to the
3 Democratic Party, we're suddenly worried that the
4 candidate is going to be corrupted because Schwartz gave
5 \$100,000? I can't understand that. That seems to me so
6 fanciful to think that the one situation presents, you
7 know, an opportunity for corruption and the other doesn't.
8 You're much better off if you want to corrupt Schwartz,
9 spending the money on an advertisement that says
10 presented, you know, presented by XYZ Corporation.

11 MS. UNDERWOOD: Well, the Court in Buckley had
12 to balance a number of different concerns in arriving at
13 its distinction between independent expenditures, which
14 will certainly often please the candidate, but which it
15 regarded as sufficiently important in First Amendment
16 terms so that limiting them to protect against possible
17 indirect corruption was not permissible on the one hand,
18 and contributions, direct contributions to the candidate,
19 which the Court saw as having a lesser First Amendment
20 component on -- importance on one side --

21 QUESTION: Right.

22 MS. UNDERWOOD: -- and a greater potential for
23 corruption on the other. That distinction having been
24 made, coordinated expenditures are the functional
25 equivalent of contributions. When you pay somebody's

1 bills, it's no different from handing them a check, and
2 that's what we have here.

3 Now, the additional point that I was addressing
4 was the use of an intermediary to make the, that is, if
5 we, if we have a prohibition on contributions and
6 coordinated -- not a prohibition, a limitation on
7 contributions and coordinated expenditures to protect
8 against corruption, then it can be easily circumvented
9 through intermediaries, and there are only a few ways to
10 solve the intermediary problem. One of them is to limit
11 contributions to the intermediary, in this case the party.
12 Another is to limit contributions by the intermediary to
13 the candidate. That would be from the party to the
14 candidate. And the third is to try to prevent earmarking
15 directly. Each has its pros and cons, and the statute
16 uses each of them to some degree to complement the other.

17 This Court recognized in Buckley that it's
18 impossible to police earmarking sufficiently because of
19 informal and nonrigid arrangements. The approach of
20 limiting contributions to the party so that it can't
21 operate as a pass-through, would starve the party of
22 needed funds. It has disadvantages of that sort. There
23 is a limitation, but it's a high limitation.

24 QUESTION: But what does the party use its
25 limited funds for? I mean, the whole purpose of a party

1 is to support candidates, and to say that the party can't
2 use its funds for candidates is to say that you know,
3 parties don't -- cannot play a significant part in
4 American politics.

5 MS. UNDERWOOD: The section --

6 QUESTION: And you talk about the significant
7 First Amendment value of an individual being able to spend
8 his money on an ad for the candidate, there is significant
9 First Amendment value in that. It is not clear to me that
10 there is any less First Amendment value in people being
11 able to band together in political parties and in unison
12 support political candidates. That's a very important
13 First Amendment value, too, and you're saying they can't
14 do that.

15 MS. UNDERWOOD: Well, no.

16 QUESTION: Well, you're saying they can do it to
17 a very limited degree, although rich individuals can take
18 out their own television ads, a party which gets
19 contributions from Joe Sixpack in five and ten dollar
20 amounts cannot do that to support a candidate. I mean --

21 MS. UNDERWOOD: No, the party can do it in
22 unlimited amounts when it is making the same kind of
23 independent expenditure that the Court held was entirely
24 protected in Buckley and in --

25 QUESTION: I mean, we're only talking here about

1 the coordinated hard money, so to speak, party
2 expenditures on behalf of candidates.

3 MS. UNDERWOOD: That's correct. That's correct.

4 QUESTION: That's such a tiny segment of the
5 problem. We're not talking about soft money here, right?

6 MS. UNDERWOOD: That's right.

7 QUESTION: Not talking about general limits on
8 contributions?

9 MS. UNDERWOOD: That's right. This is a small
10 segment of the problem.

11 QUESTION: Okay.

12 MS. UNDERWOOD: It is a segment --

13 QUESTION: Given that it's a small segment of
14 the problem, what showing is there that there are enough
15 problems with this small segment of corruption that
16 justifies the limit? I mean, it's a little --

17 MS. UNDERWOOD: Well --

18 QUESTION: I don't know quite how to deal with
19 it. It's such a small segment of the problem. Now what's
20 the justification here for this limit?

21 MS. UNDERWOOD: Well, the evidence that there is
22 a risk of intermediaries, parties in particular, but
23 intermediaries in general, aiding donors to circumvent
24 statutory limits is found in several places.

25 First of all, in the Senate debate in 1973, and

1 we discuss this at pages 28 and 29 of our brief, several
2 Senators made -- expressly observed that a party can act
3 as a conduit for an individual who has reached his
4 contribution limit.

5 QUESTION: So the danger is that contributors to
6 political parties are using those contributions to somehow
7 corrupt the candidates?

8 MS. UNDERWOOD: Correct.

9 QUESTION: And that's kind of an indirect sort
10 of a thing?

11 MS. UNDERWOOD: That's right. That the
12 anti-earmarking provision itself is evidence of Congress'
13 concern about that, about the evasion of the limits on
14 donors.

15 QUESTION: And you say the earmarking provision
16 isn't sufficient?

17 MS. UNDERWOOD: That's correct.

18 QUESTION: And where do we look for this
19 evidence of concern? To stray remarks by some Members of
20 Congress or is there anything else?

21 MS. UNDERWOOD: Well, there are remarks by
22 Members of Congress. There is, better perhaps even than
23 anything congressional -- anything that was said, the fact
24 that Congress enacted an anti-earmarking provision which
25 shows that it was concerned about the danger that donor A

1 would avoid his -- the limit that he could contribute to
2 candidate C by passing it through B.

3 QUESTION: But you think that's not sufficient?

4 MS. UNDERWOOD: That's correct. And this Court
5 said it wasn't sufficient in Buckley, and observed that
6 that's part of why -- part of what justifies the limit on
7 individual contributions in a campaign, the total limit,
8 not --

9 QUESTION: Is the argument, General Underwood,
10 it is not that the party is corrupted, I take it, because
11 that would seem just fatuous, but the party is kind of a
12 means to corrupting the candidate himself?

13 MS. UNDERWOOD: Yes. There are two arguments
14 about the risk of corruption. At the moment the argument
15 that I'm talking about is that the party is a means -- that
16 the contribution limits on individual donors are justified
17 as a means of preventing corruption and the risk of
18 corruption donor to candidate, and that the party, as an
19 intermediary, can facilitate, can essentially undermine
20 that mechanism that the individuals can exceed their
21 contribution limits.

22 QUESTION: So it's a prophylactic rule, kind of?

23 MS. UNDERWOOD: Well, I would say -- I wouldn't
24 call it a prophylactic rule. I would call it an
25 amplification or a support or a backup to the

1 anti-earmarking provision. It's addressed at the same
2 problem that the earmarking provision is addressed at.

3 QUESTION: But it covers much more than
4 earmarked funds.

5 MS. UNDERWOOD: But it covered --

6 QUESTION: It covers any funds that the party
7 has, so it is prophylactic. It's excluding the party from
8 doing many things that wouldn't be corrupting, right?

9 MS. UNDERWOOD: Well, no more thing that the
10 contribution --

11 QUESTION: Because this is the fear that some of
12 them might be.

13 MS. UNDERWOOD: Than the direct contribution
14 limit.

15 QUESTION: Sure, but that's prophylactic, too, I
16 suppose.

17 MS. UNDERWOOD: Well --

18 QUESTION: Do you agree with --

19 MS. UNDERWOOD: Yes, it is not the case -- I'm
20 sorry, Justice Stevens.

21 QUESTION: I was just going to ask you, do you
22 agree with the proposition, or to what extent do you
23 disagree with the proposition that the basic function of
24 the party is to elect candidates and therefore a
25 limitation on the ability of the party to give money to

1 candidates pretty well disables the party from doing what
2 it was created to do?

3 MS. UNDERWOOD: I don't think it disables it. I
4 would agree that it -- that the function of the party is
5 in large part to elect candidates, and that a limitation
6 -- I guess any limitation on it -- but I -- if it were
7 prohibited from making any contributions to candidates and
8 if it were prohibited from making independent
9 expenditures, it couldn't accomplish its purposes.

10 There is no limit on its independent
11 expenditures. There is no limit on a large variety of
12 party building and get-out-the-vote and
13 message-communicating activities, and there is a not --
14 there is a not -- there is a limit, the limit on
15 contributions to candidates, and the limit on coordinated
16 expenditures which are a form of contributions is not
17 disabling. It's quite a bit higher than the limit on any
18 other contributor, recognizing the role of the party, but
19 just attempting to put a ceiling on it. It's a limit
20 that's adjusted. It's basically --

21 QUESTION: So it serves free speech for the
22 party to spend money on behalf of a candidate without
23 discussing with that candidate the candidate's views and
24 to make sure that the candidate's campaign is the same as
25 the party. It serves free speech if the party doesn't

1 coordinate with the person that it's backing.

2 MS. UNDERWOOD: Coordinated expenditures have --

3 QUESTION: It's a very strange, very strange
4 calculus.

5 MS. UNDERWOOD: Coordinated expenditure has a
6 technical meaning here, and it doesn't violate the
7 prohibition on coordinated expenditure for the party to do
8 something that is consistent with the candidate's
9 campaign.

10 What the coordinated expenditure prohibition was
11 designed to prohibit was the candidate essentially paying
12 the media bills for the candidate, and the record contains
13 evidence that the over -- that the predominant forum that
14 coordinated expenditures take is exactly that.

15 QUESTION: What if, what if the party consults
16 the candidate and says, you know, we're thinking of
17 running a series of issue ads, and we're going to say
18 you're a big supporter of gun control? Now you that will
19 help you or hurt you? We don't want to do it if you think
20 it will hurt you. What about it? And he says, you know,
21 one or the other, it doesn't matter. Would that not be a
22 coordinated expenditure?

23 MS. UNDERWOOD: I'm not at all sure that it
24 would be, Justice Scalia. There may be difficult cases at
25 the margin, as the donor takes more initiative and the

1 candidate less.

2 QUESTION: But that's a pretty fundamental
3 question. I don't think that's a marginal question. This
4 question has to come up all the time. Can the party
5 consult the candidate at least on what issues the
6 candidate wants the party to address in its advertising?
7 It sounds like coordination to me.

8 MS. UNDERWOOD: Coordination isn't even a
9 statutory term, but the Federal Election Commission has
10 been developing regulations to try and make more precise
11 exactly what is prohibited here. It is clear, it has been
12 clear from the outset of the statute that the purpose of
13 the prohibition here, it's a permission for independent
14 expenditures. The limitation on coordinated expenditures
15 is to prevent the candidate, prevent anyone -- party or
16 anyone else -- from making contributions in the form of
17 paying the candidate's bills.

18 QUESTION: All right. Let's say that this is
19 not a coordinated expense. Are the parties allowed to do
20 it? Which would mean that a fat cat industrialist bent on
21 corrupting the candidate could write to the candidate a
22 letter and say, you know, I'm giving \$100,000 to the
23 Democratic National Committee to spend on gun control
24 issue advertising, which I am sure will help your
25 campaign.

15

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1 MS. UNDERWOOD: Well, that's a feature of any
2 independent expenditure. It is so --

3 QUESTION: No, but what I'm saying is, once you
4 allow that, doesn't that have the same corruptive effect
5 as what you're trying to prohibit?

6 MS. UNDERWOOD: No. Although these things are
7 all a matter of degree, it is the case, I mean, it's -- it
8 is the case that Congress thought that contributions over
9 a certain limit created a potential for corruption, and
10 that to make that enforceable, it had to prohibit as well
11 or limit as well things that are the functional equivalent
12 of contributions, such as --

13 QUESTION: But it's also the case that the
14 Congress under the statute that you're defending forces
15 exactly the type of indirect support that Justice Scalia
16 has just described instead of having it out in the open
17 where everybody knows who is supporting who and who is
18 paying money for whom. That seems to me just completely
19 contrary to the whole idea of the truth that the First
20 Amendment is designed to vindicate.

21 MS. UNDERWOOD: It may be that a narrower
22 definition of coordinated expenditures, then, seems to be
23 sort of in the air at the moment is what would serve this
24 method, this problem best, and the Federal Election
25 Commission at the moment has under advisement, is

1 considering rewriting its -- considering new regulations
2 regarding the definition.

3 QUESTION: No, we're assuming -- I think we were
4 assuming a narrow definition of coordinated expenses. We
5 were assuming that the parties spending money on gun
6 control advertising, after consulting with the candidate
7 about that, is not a coordinated expense, so the party
8 would be able to do it. We were assuming a narrow
9 definition. And the narrower the definition is, the more
10 it raises the same problems of flow-through to the
11 candidate from identified malefactors of great wealth
12 that, that you're trying to prohibit.

13 MS. UNDERWOOD: Well, Congress was trying to
14 strike a balance here in the light of what this Court said
15 it could and couldn't do in respect of, on the one hand,
16 protecting the speech interests of contributors, of
17 spenders, of independent spending and on the other hand
18 attempting to guard against the risk, the reality and the
19 appearance of corruption which at its narrowest is quid
20 pro quo and moving out from that is implicit, excessive
21 compliance that is like a quid pro quo.

22 QUESTION: Did Congress, having made the --
23 drawn the line where it did to whatever expertise that
24 branch of government has with political campaigns and
25 campaign spending?

17

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1 MS. UNDERWOOD: Yes. It has been observed
2 before that Congress perhaps -- well, that Congress is
3 fully familiar with the practices of campaign expenditures
4 and campaign fund-raising and with the risks and benefits
5 that various forms of fund-raising have and that having
6 evaluated all of those risks and benefits and taken
7 guidance from these courts, the distinctions that this
8 Court has drawn, its effort to, to make those judgments is
9 entitled at least to some, some credit.

10 QUESTION: Do we owe any deference to common
11 sense in recognizing that when Congress draws up campaign
12 funding legislation, it is more likely to draw up a system
13 that favors incumbents and is it not true that this rule
14 of course favors incumbents because the one who suffers
15 the most when he can't get significant funding from the
16 party is the new candidate, the unknown face who is
17 running against an incumbent? And that's what happens.

18 MS. UNDERWOOD: I think if we -- I think if we
19 --

20 QUESTION: It doesn't surprise me that Congress
21 would not be terribly upset by this restriction. It
22 favors incumbents all the time.

23 MS. UNDERWOOD: Well, common sense points in
24 several directions. I think that the most basic common
25 sense proposition here is that so long as there's a limit

1 on what donors can give to a candidate, they will be
2 trying to find ways to get around it, and one good way is
3 to use intermediaries that are not subject to the same
4 limits and that Congress recognized that and attempted to
5 address it without crippling other important functions by
6 putting a limit on the contributions, by not prohibiting,
7 but putting a limit on the contributions and coordinated
8 expenditures that parties can make to candidates.

9 There is a second corruption concern, and that
10 is the concern, not that the party would act as a conduit,
11 but that the party leaders in charge of dispensing funds
12 would, in effect, exact -- pay for votes, would themselves
13 tie money to legislative actions. There is no direct
14 evidence in the record of that happening, but it is the
15 case that if a candidate's own family can be subject to a
16 prohibition on contributions in order to protect
17 corruption, there is no such thing as being too close to
18 corrupt, and --

19 QUESTION: How does the record on the potential
20 for corruption differ here than what was before the Court
21 in Nixon against, what, Shrink?

22 MS. UNDERWOOD: Well, in Nixon against Shrink --
23 Shrink, Missouri Political Action Committee, the question
24 was whether the corruption, the potential for corruption
25 that justified the Federal statute also justified the

1 State statute, and the court said that it wasn't necessary
2 to develop new evidence of essentially the same,
3 essentially the same problem.

4 QUESTION: That was -- Shrink, Missouri,
5 involved contribution limits, did it not?

6 MS. UNDERWOOD: Yes, it does. But so, in fact,
7 does this case, in that coordinated expenditures are, in
8 effect, contributions or if this Court were to conclude
9 that they are not, then it would be decided --

10 QUESTION: But your corruption rationale is much
11 less if you're talking about a big wheel or, you know, a
12 fat cat donating a lot of money to a candidate, the idea
13 is the fat cat is going to get something in return, but
14 the idea that a political party donating to a candidate is
15 going to get something in return just doesn't have the
16 same ring to it.

17 MS. UNDERWOOD: Well, as I suggested, it does,
18 however, I think, have the same ring to say that a
19 political party can facilitate the very transaction that
20 you were just describing; that is, the fat cat now not
21 giving money directly to the candidate because he's barred
22 from doing so, but giving it to the party to transmit to
23 the candidate with everybody understanding exactly what's
24 going on.

25 QUESTION: But that's a form of a prophylactic

1 rule which we have never sustained in the First Amendment
2 context, I don't think.

3 MS. UNDERWOOD: Well I don't think it's any more
4 prophylactic than the prohibition on contributions in the
5 first place. Not every contribution, in fact, is corrupt,
6 but a limit -- it's not a prohibition. A limit on
7 contributions is designed to minimize the risk of --

8 QUESTION: But it depends on how much you're
9 hurting the person that's being prohibited. I just don't
10 agree with you that, my goodness, if we can do it to
11 families we can certainly do it to political parties. I
12 mean, with few exceptions, the whole reason for being of a
13 family is not to get the father or mother elected to
14 office, and that is the whole -- that is the whole reason
15 for being of a political party, and to say that it can't
16 do that in the most and perhaps the only effective way, by
17 coordinating its expenditures with the very candidate is a
18 really great impingement upon the functioning of the
19 party, unlike the family.

20 MS. UNDERWOOD: Well, I think the function of
21 the family is to advance the interests of its members, but
22 I would like to reserve the rest of my time for rebuttal.

23 QUESTION: Thank you, General Greenwood. In my
24 elementary school there was a girl named Barbara
25 Greenwood.

1 MS. UNDERWOOD: Well, I hope you held her in
2 high regard.

3 QUESTION: Mr. Baran.

4 QUESTION: Chief, I'm Scalia.

5 ORAL ARGUMENT OF JAN W. BARAN

6 ON BEHALF OF THE RESPONDENT

7 MR. BARAN: Thank you, Mr. Chief Justice, and
8 may it please the Court, the statute before you makes it a
9 crime for a political party to send one letter to every
10 voter in the State if the candidate requested that letter
11 or collaborated in its preparation.

12 The issue before the Court is whether this
13 clear, direct, and substantial infringement on political
14 parties' First Amendment rights is justified, and based on
15 this Court's precedent, the legislative record, and the
16 factual record developed in this lengthy case, the answer
17 must be no.

18 The record demonstrates that this limit directly
19 and substantially suppresses political party speech and
20 does not prevent any discernible form of corruption.
21 Moreover, this particular Federal limit stands in contrast
22 to the majority of State laws which may restrict
23 contributions to political parties, and contributions to
24 candidates do not restrict the amount of party support
25 that can be received by candidates themselves with State

1 elections.

2 The money that the party can spend for the
3 prohibition --

4 QUESTION: Excuse me. You say the majority of
5 State laws. How many states have a prohibition of this
6 sort, do you know?

7 MR. BARAN: According to the amicus brief of the
8 attorneys general, there are 17 current states that have
9 such a restriction of some form. There used to be 20
10 states. Three have repealed these restrictions, most
11 recently Colorado last year and also our largest State,
12 the State of California in November of 2000 had a
13 referendum and over 60 percent of the voters of California
14 supported that proposition, which was number 34, and that
15 proposition placed numerous restrictions on contributions
16 to candidates, contributions to political parties, but at
17 the same time repealed a short-lived restriction that the
18 State of California had on the amount of contributions or
19 expenditures that parties could make in support of
20 candidates for office in the State of California.

21 The money that the parties can use to support
22 their candidates for the House and the Senate and even for
23 President has to be the so-called hard money. The
24 District Court noted in its opinion that the majority of
25 this so-called hard money that the national parties raise

1 comes in sums of less than \$100.

2 It is true that there are contribution limits
3 that are somewhat higher for parties and for candidates.
4 For my client, the Colorado Republican Party, that limit
5 is \$5,000 per year. And for national party committees the
6 limit on individuals is a maximum of \$20,000 a year.

7 I believe the record shows that there are very
8 few \$20,000 contributions --

9 QUESTION: Now, if you win, and I guess this is
10 their main rationale, what they're saying, if you win, to
11 give a practical example, if you have a family of four, I
12 guess candidate X who is running for the Senate, can take
13 \$4,000. And then if you win, instead of \$4,000, he could
14 take \$80,000 through the party.

15 All right, so if you assume a Senate race that
16 costs \$4 million, let's say, the difference would be
17 between whether you had to find 50 willing donors with
18 families or a thousand. So couldn't Congress conclude
19 that where a Senator is dependent upon 50 families with
20 \$80,000 each, the appearance, anyway, that the Senator
21 will be quite beholden to those 50 is far greater than
22 where he must, in fact, get that \$4 million from at least
23 a thousand? Now, that it seems to me is what the
24 government's argument boils down to, and they're saying we
25 never know about these corruption things or the

1 appearance, but the difference between fifty families and
2 a thousand families is as good as any.

3 MR. BARAN: Yes, Justice Breyer, that is my
4 understanding of their argument. I would point out that
5 everything you just described, assuming it was lawful and
6 did not violate the anti earmarking provisions of the
7 current statute, would be permissible under the current
8 system with these limits, with these spending limits.

9 QUESTION: Because they limit the spending, as
10 you just pointed out, to the party, to the candidate
11 directly to a hundred and some odd thousand dollars. So
12 it's a kind of compromise. But if you win this, the
13 limitation's gone, and therefore the first thing a
14 candidate does is he says to the 50 people who know him
15 the best, thank you for the four. Now I'll tell you how
16 you give me \$76,000 more. Just write the check to the
17 party, and I'll keep a tally, and so do they. And believe
18 me, I'll know where it comes from.

19 MR. BARAN: I stand by my earlier answer,
20 Justice Breyer, that that is possible under the existing
21 system, that a candidate, taking your hypothetical, could
22 say I don't want to raise contributions from a thousand
23 people. I will simply go and collect the contributions
24 you just described from a large family and direct it
25 towards the party.

1 QUESTION: Isn't there then a limit on what the
2 party can give him?

3 MR. BARAN: Yes, there is a limit. But they can
4 do it within these spending limits.

5 QUESTION: Well, within that limit, right, but
6 the different --

7 MR. BARAN: Within the spending limits. And if
8 this practice is actually plausible, which I don't believe
9 it is, surely there would be a single instance of this
10 type of contribution practice that would have occurred in
11 the last 25 years under these limits including in states
12 with very sizable spending limitations on parties.

13 QUESTION: Well, I presume --

14 MR. BARAN: And there is none.

15 QUESTION: -- there are -- are there not
16 instances in the record in which individuals who have
17 contributed their maximum directly to the candidate have
18 then made contributions to the political party? I mean, I
19 assume that. There's no dispute that that has happened.

20 MR. BARAN: That is correct. Contributors do
21 contribute to the party who have also contributed to
22 candidates.

23 QUESTION: If that has happened, then exactly
24 what Justice Breyer is describing can occur, but it occurs
25 in comparatively piddling amounts as against what would be

1 possible if you win this case.

2 MR. BARAN: I disagree, Justice Souter. The
3 hypothetical that has been advanced here is that there is
4 an incentive for candidates to go to individual
5 contributors and urge them to donate money through the
6 party without violating the anti-earmarking provisions in
7 large sums of \$5,000 or \$20,000 in Justice Breyer's
8 hypothetical.

9 QUESTION: That is the assumption --

10 MR. BARAN: There is no --

11 QUESTION: Why is that implausible?

12 MR. BARAN: I believe it's implausible because
13 there is not a single instance of that having happened in
14 the 25 years of the --

15 QUESTION: Well, I think we may be playing with
16 words. There are instances of contributors to individuals
17 who are also contributors to the party, and I suppose
18 those instances do not stand out as outrageously obvious
19 examples of, you know, something close to quid pro quo
20 because the amounts are small. We're not able to interpret
21 the things more finely than that, but it seems to me that
22 the suggestion of the question is intuitively sound, and I
23 don't know why it isn't intuitively sound. You're saying,
24 well, it's not intuitively sound because we have no
25 examples of what would go on if I won the case. And we

1 don't have those examples because we have the current law
2 in place.

3 MR. BARAN: No, Your Honor, I believe we have no
4 examples because after 15 years of litigation in this
5 case, including five-and-a-half years of discovery,
6 including depositions of numerous party officials and
7 elected officials, there's not a single instance of any
8 contributor, any contributor giving any amount of money
9 that is designated for a specific candidate.

10 QUESTION: I'm sorry, I knew that, but I may
11 have read the newspapers with a cynical eye, but it seems
12 what I read in the papers says that some candidates,
13 anyway, write letters to their friends and say, now, write
14 checks for X to me personally, then you max out. Now
15 here's what you do next, write some checks to the party.
16 Now at this level you max out again. Now here's what you
17 do after that. You write some soft money checks, and
18 there is no max.

19 Now, have I read the newspapers wrong or is that
20 possibly practice in respect to some political candidates?

21 MR. BARAN: I think the newspapers also reflect
22 that there are people who are pleading guilty and actually
23 going to jail --

24 QUESTION: No, no, no, but --

25 MR. BARAN: -- for making earmarked or straw

1 contributions.

2 QUESTION: No, I --

3 MR. BARAN: The record in this case, Justice
4 Breyer, does not have an instance of that type of
5 circumstance. It does support the proposition that when
6 candidates are involved in helping their parties raise
7 money, which they are involved in, they do so without such
8 designations, without such promises that the money will be
9 spent for them, and the record is very consistent that the
10 political parties maintain control over whether to spend
11 that money, how to spend it, and on whose behalf.

12 QUESTION: I see why we're -- is this the point
13 of what I consider our miscommunication.

14 MR. BARAN: Okay.

15 QUESTION: I have not specified something. You're
16 turning your answers on the fact that you can't earmark
17 the, the circuitous route, and so for my assumptions to be
18 correct, I have to be assuming a fact that's debatable,
19 and that is that the tally system works approximately
20 similar to earmarking, but on my assumption that that's
21 factually true, we get to my questions, but on the
22 assumption it's not factually true, then your answers are
23 -- is that the point of disagreement?

24 MR. BARAN: I believe that is true.

25 QUESTION: Thank you.

1 MR. BARAN: I do think that is an assumption of
2 a fact that I believe the record does not support.

3 QUESTION: Well, of course, unless there's
4 earmarking, I suppose the opportunity of corruption is
5 very little greater under what the regime would be without
6 this prohibition than it is what the regime would be with
7 it. I suppose any candidate would feel sympathetic to
8 someone who was agreed to give \$80,000 to the State party,
9 which he knows will be used to support him even though not
10 in coordination with him. Isn't there -- don't you think
11 your candidates generally feel sympathetic to people who
12 give a lot of money to the State committee, even under the
13 current regime?

14 MR. BARAN: Yes, that they are --

15 QUESTION: Knowing that the State regime will
16 spend a lot of money to help them in one way or another,
17 coordinated or not?

18 MR. BARAN: Well, the record reflects that many
19 candidates, primarily incumbent office holders, are very
20 active in raising money for their parties. The record also
21 shows that political parties are the only source of
22 financial support in our system that do not primarily
23 support incumbents. In fact, this past election we have
24 experienced the phenomenon that more money is being
25 donated to political parties from excess funds of

1 incumbents who face virtually no competition in their
2 reelection efforts than the amount of money that is
3 actually being spent by political parties to support other
4 incumbents who are in danger of losing reelection.

5 So we have a possibility here that the people
6 that candidates should really be indebted to are
7 incumbents who are relinquishing large sums of their own
8 money to help their party elect challengers and open-seat
9 candidates to join incumbents in the House or the Senate.
10 And that is what this record shows. This record also
11 shows that the money, the hard money that's being spent is
12 being spent on party speech. Over 90 percent of the money
13 that's subject to these spending limits is for direct mail
14 and television and radio. Now, that's as of 1997. I
15 believe that percentage has increased since we took all of
16 those facts back in 1997. The record also shows that the
17 political parties like to control how they are going to
18 spend their money. They don't like to just give a pot of
19 money over to the candidates. The record shows in the
20 testimony of Donald Dane, Colorado Republican Chairman,
21 that we don't want to do that. We don't know how our
22 money is going to be spent. We have so much difficulty
23 raising this money, why would we want to do that. We want
24 to decide how it's going to be spent, for what purpose and
25 whether or not this was a good use of our limited

1 resources, and that is actually what the practical effect
2 is of striking down this spending limit is, I think there
3 is a misconception --

4 QUESTION: What is the practical effect of
5 striking it down? Is it significant or not? I'm trying
6 to figure it out.

7 MR. BARAN: I think it is significant in the
8 following two respects, Justice O'Connor. Number one, it
9 takes away from the Government and places back to the
10 political parties the discretion as to how best to use
11 these limited resources in the form of hard money. It
12 doesn't do a party any good to have a right to spend \$3
13 million under this limit in California if there isn't a
14 competitive race there for the Senate and at the same
15 time, there might be an extremely competitive race in the
16 State of Colorado where the limit is 200 or \$300,000,
17 depending on the formula, so the party has whatever money
18 has been voluntarily contributed to it under all of those
19 other restrictions. It's hard money. They decide well, we
20 want to spend perhaps \$500,000 in Colorado, or we want to
21 spend a greater amount of money in California if we did
22 have a competitive race.

23 QUESTION: You can do it as long as it's not
24 coordinated. What is the -- why does the restriction on
25 coordination give you a problem?

1 MR. BARAN: Well, the record that we developed
2 after this Court's consideration in 1996 deals with the
3 exercise of political parties of making independent
4 expenditures in the '96 election, and what they
5 experienced were occasions where, by spending their money
6 without consultation with their own candidates, they made
7 some mistakes, political mistakes. They contradicted
8 their candidates. They may have mischaracterized their
9 position, and the result is, that in order for them to
10 exercise their full First Amendment rights by spending
11 their money independently and ripping themselves away from
12 their indispensable candidates, they actually run the risk
13 of harming the candidates who are so important to their
14 own electoral success.

15 Now, with respect to any other independent
16 expenditure, of course, the jurisprudence here says that
17 that's a risk that any individual or political committee
18 runs by --

19 QUESTION: I'm not sure how important this is,
20 but what you just said suggests this to me, that there
21 sometimes is a difference of approach to an election
22 between the candidate and the party and if you allow this
23 statute to be held unconstitutional, you would allow the
24 party to exercise its influence to cause the candidate to
25 shift its views to accept those of the party. Isn't that

1 one of the -- one of the factors that's involved here?

2 MR. BARAN: Well, there is a fundamental, a
3 fundamental question of what is the right of a political
4 party in terms of placing conditions on how they are going
5 to spend their money or support candidates. There is no
6 reason why a party could not say we will only financially
7 support candidates who agree with our party platform to
8 cut taxes. And if they decide not to support a candidate
9 who doesn't adhere to that platform plank, then presumably
10 that is their right to do so. It's not corrupt.

11 QUESTION: Mr. Baran, you were going to give two
12 responses to Justice O'Connor. You said there were two
13 reasons. I was waiting for the second one but just before
14 we get too far away from it, what was the second?

15 MR. BARAN: The practical effect of striking
16 down these limits in addition to giving parties their
17 discretion as to how best to spend their limited resources
18 is that I believe the other practical effect is that it
19 will provide an incentive for political parties to raise
20 more hard money, which is presumably the beneficial money
21 that we have in our process.

22 Right now, there is actually a perverse effect
23 of these limits, rather than preventing corruption,
24 arguably, they are promoting corruption because the limits
25 tell a party chairman or fund-raiser it really doesn't

1 matter how much hard money you raise. You are not going
2 to be able to spend more than this amount to promote your
3 candidates. So a party leader says, well, why should I
4 devote my limited resources and time and energy on raising
5 more hard money that I cannot spend, as opposed to going
6 out and raising more of the soft money, which cannot be
7 spent for perhaps the same purposes, and can't be as
8 politically effective, but I'm going to raise more soft
9 money and the statistics that are in the record show that
10 soft money has increased at triple digit rates from '92 to
11 '96, '96 to 2000, and yet hard money fund-raising has
12 essentially plateaued.

13 QUESTION: Okay but that's, I mean, that may be
14 a very good argument to Congress, maybe a dangerous
15 argument because the soft money opponents may find
16 something to run with there, but I'm not sure that it's an
17 argument, and I realize you were asked to get into this,
18 but I'm not sure that it's an argument that's going to
19 help us decide this case.

20 MR. BARAN: No.

21 QUESTION: I take it so much of the -- the other
22 side's position here depends on the relationship between
23 the coordinated expenditures and the individual
24 contribution limits to the candidates themselves. Do you,
25 do you contest the, I guess, intuitive assumption that if

1 a candidate had the choice of retaining the present limits
2 on contributions directly to that candidate, and on the
3 other hand, having a system in which there were no
4 contribution limits, he could accept any amount from
5 anybody, do you, do you contest the intuitive judgment
6 that he would probably accept the latter system and say,
7 sure, let me accept any amount of money?

8 MR. BARAN: From anybody.

9 QUESTION: Yes.

10 MR. BARAN: In lieu of what? I'm sorry.

11 QUESTION: In lieu of the current system of
12 limitations on contributions to make.

13 MR. BARAN: I don't know the answer to that
14 because it requires me to try and read the minds of many,
15 many politicians. I believe that there would be a
16 division of opinion. On the one hand, there would be
17 politicians who would say, yes, I would like to scrap this
18 system and be able to take unlimited amounts of money from
19 individuals or political committees and I'm prepared to
20 hold myself accountable to the public and the voters for
21 that decision.

22 On the other hand, I think there would be
23 politicians and incumbents who say, no, I really don't
24 want that because I think it would present a political
25 problem or it may open the doors to some undue influence

1 and pressures from large --

2 QUESTION: Won't the first group, the group that
3 says, yes, I would like to replace the present system and
4 be able to take as much as anyone wants to give me,
5 wouldn't that first group prefer a system in which there
6 was no limitation upon coordinated expenditures by the
7 party because that first group could achieve very much the
8 same result in that way, isn't that so?

9 MR. BARAN: No. I believe that there is a very
10 substantive and historical difference. One of the
11 distinguishing features of the legislative record going
12 back to Congress' consideration of campaign finance reform
13 in the early 1970s is that while there is a great deal of
14 concern expressed regarding individuals and political
15 committees supporting candidates of political parties, the
16 utterances from Congress regarding political parties are
17 uniformly laudatory. I mean, they say, well, this is
18 important institutions, they're unique. We've got to give
19 them lots of room to operate.

20 QUESTION: Well, sure. But now we're, now we're
21 -- what I'm positing is a system in which the political
22 party, which everybody esteems for different reasons,
23 perhaps, but everybody supports, now, on your theory the
24 political party can simply be given another useful task
25 and the useful task, in effect, would be to eliminate the

1 need of the candidate to be scrambling for the \$100
2 contributions if it could accept, in effect, through the
3 party, contributions in the amounts that Justice Breyer
4 was talking about in his hypo a while ago.

5 MR. BARAN: But I believe Congress has perceived
6 that to be a benefit, not only to them, but to the entire
7 democratic process.

8 QUESTION: Well, if it perceives it as a
9 benefit, why does it have the restriction on coordinated
10 expenditures? Apparently, it does not perceive it as a
11 total benefit?

12 MR. BARAN: Well, there is a very interesting
13 reason for that, which goes back to when Congress devised
14 the campaign finance system that this Court reviewed in
15 the Buckley decision. And the genesis of this particular
16 limit was introduced in the United States Senate back in
17 1973 or 1974 at a time they were considering a bill which
18 provided for no private contributions in general elections
19 for the Senate or the House and that there was going to be
20 completely publicly-financed and when they got to this
21 public financing proposition, somebody got up and said,
22 well, what about the parties? I mean, we have got to let
23 them operate and they said, well, that's great, we're
24 going to let them operate, but of course, our principal
25 concern in addition to corruption is we want to equalize

1 resources and we want to make sure that there is not
2 excessive spending so we're going to devise this formula,
3 which is more generous than we are providing to anyone. In
4 fact, it's generous exponentially because we're telling
5 individuals and political committees they cannot
6 contribute to these candidates at all, and that's the
7 genesis of this limitation.

8 We discussed that in 1996 before this Court that
9 shows that historically this was a limit imposed to
10 prevent excessive spending. This court noted it in the
11 decision of FEC vs. Democratic Senatorial Campaign
12 Committee and the plurality decision noted that
13 congressional purpose.

14 QUESTION: Well, that is certainly a rationale
15 that supports spending limits generally, but I don't know
16 that it is, it is or was meant to be the exhaustive
17 rationale for a distinction between coordinated and
18 uncoordinated because if that were the only issue there
19 wouldn't have been any distinction.

20 MR. BARAN: Well --

21 QUESTION: A spending limit is a spending limit.
22 And if you're distinguishing between coordinated and
23 uncoordinated, presumably you have a different policy in
24 mind, and I presume, and I haven't heard anything to the
25 contrary, that the policy is exactly the intuitive

1 judgment that was behind the original hypo of Justice
2 Breyer's.

3 MR. BARAN: I believe that if that were the
4 policy surely one Senator or one Congressman, at some
5 point, in the consideration of campaign finance over a
6 period of literally decades would have gotten up and said
7 you know what --

8 QUESTION: Did they do it for no reason at all?

9 MR. BARAN: Surely one Senator or one
10 Congressman at some point in the consideration of campaign
11 finance over a period of literally decades would have
12 gotten up and said, you know what --

13 QUESTION: Did they do it for no reason at all?

14 MR. BARAN: No. They did it to limit spending.

15 QUESTION: They don't need to distinguish
16 between coordinated and uncoordinated if that's what
17 they're concerned with?

18 MR. BARAN: No. Because, and this may explain a
19 little bit of that dichotomy in the statute today that we
20 have that contribution limit of \$5,000 to candidates from
21 a political party and yet we have this special provision
22 in Section 441a(d). Well, back when they introduced this
23 original statute, there weren't going to be any
24 contributions by anybody to candidates for the Senate and
25 the House in general elections.

40

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1 QUESTION: Now there are. Are you saying that
2 the rationale for what happened here was just
3 inadvertence. Nobody thought about it? Nobody went back
4 and said, hey, we don't need this now?

5 MR. BARAN: I believe that the rationale for
6 this provision today is the original rationale, the entire
7 statute, this provision was transferred verbatim after
8 this Court's decision in Buckley from the criminal code of
9 Title 18 into the existing statutory provision of Title 2.
10 And other than the report language that was noted in the
11 Government's brief regarding the effect of this provision
12 after Buckley, there is no other congressional utterance
13 that I'm aware of regarding the purpose of the statute.
14 This really is a relic from Congress' effort to basically
15 control spending in the entire political process.

16 There is one final point I would like to bring
17 to the Court's attention. There has been discussion about
18 Congress' treatment of family members and there is an
19 intimation that perhaps there was no record or legislative
20 record regarding Congress' actions in that regard. We
21 noted in our reply brief in 1996 that there is legislative
22 record of concern back in 1974 about wealthy family
23 individuals contributing to candidates of their family.
24 There was even the example noted of concern that Nelson
25 Rockefeller's mother had contributed one and a half

1 million dollars to his campaign in 1968, and there are
2 some floor statements by legislators as well. So it is
3 not accurate to say that Congress did not have any
4 expression of concern about family members, as opposed to
5 political parties, and that record was presented to this
6 Court in Buckley when it considered all of those statutes
7 at that time.

8 I would also like to address the question about
9 what is the definition of coordination. That is in the
10 statute, Section 441A. It does prohibit or it does turn
11 an expenditure into a contribution if there has been a
12 request or a suggestion, if there has been consultation
13 with the candidate and I don't believe it's at all clear
14 whether the Government would not restrict a political
15 party's spending if they simply went to a candidate as
16 suggested by Justice Scalia and said, well, will this help
17 you or will this hurt you? There is some history of FEC
18 enforcement that suggests that at least as far as the
19 commission is concerned that would constitute coordination
20 and therefore would be either subject to our limit or
21 somehow barred under the contribution limits. If there
22 are no further questions, I have covered everything I
23 intended to cover.

24 QUESTION: Thank you, Mr. Baran. General
25 Underwood, you have four minutes remaining.

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REBUTTAL ARGUMENT OF BARBARA D. UNDERWOOD
ON BEHALF OF PETITIONER

MS. UNDERWOOD: Thank you. I just want to make a few points. The rationale for the party expenditure provision has always been a conduit theory. The structure of the statute has changed, and so just exactly how the party could act as a conduit to evade whatever limits existed has changed, but right from the beginning, the concern was that the party could act to enable another donor to evade the limits by --

QUESTION: Well, you just said there is nothing in the legislative history, not one Senator, not one Congressman ever said anything like that.

MS. UNDERWOOD: Well, at pages 28 and 29 of our brief, we quote some legislative history. I think my colleague discounts it because it was at a time when the structure of the statute was somewhat different so the evasion and the conduit that was possible was somewhat different but it was nevertheless then, and is now, aimed at preventing parties from enabling individuals to avoid their limits. I mean, at page 28, Senator Matthias says that the point of this is to prevent an indirect contribution by a candidate -- by a contributor to a candidate going through the party. That was why the provision was in the statute.

1 The coordinated expenditures are like
2 contributions and it was the premise of Buckley, over some
3 objection to be sure, that they have a greater potential
4 for corruption than independent expenditures. That's true
5 for parties and for political action committees, as well
6 as for individuals, and it's true for fat cat
7 contributors, as well as for small contributors, so the
8 right that's being claimed here, the constitutional right
9 here to unlimited coordinated expenditures is, in effect,
10 a claim of right to unlimited contributions.

11 The Colorado Republican Party isn't making that
12 argument, but it seems to follow from their argument
13 because parties -- and the reason why, although parties
14 are different from other kinds of actors in the system,
15 they nevertheless need to be subjected to some limits, is
16 precisely because, as intermediaries, they can serve to
17 defeat the other limits of the statute.

18 A party has no more -- that was a judgment
19 Congress was entitled to make, not compelled to make, but
20 entitled to make. It solves a part of the problem but not
21 the whole problem. Political parties, though, have no
22 more a constitutional right to exemption from limits on
23 contributions than do political action committees and, in
24 fact, Congress gave them much higher limits.

25

1 CHIEF JUSTICE REHNQUIST: Thank you, General
2 Underwood. The case is submitted.

3 (Whereupon, at 12:14 p.m., the case in the
4 above-entitled matter was submitted.)

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